Filed 1/18/19 P. v. Boyer CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBIN DUANE BOYER, Defendant and Appellant.	F075321 (Super. Ct. No. 1484906) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Ricardo Cordova, Judge.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted appellant Robin Duane Boyer of involuntary manslaughter (Pen. Code, § 192, subd. (b);[1] count I) for the shooting death of Brandon Pacheco.[2] The jury found true that appellant personally inflicted the fatal injury and he personally used a firearm (§ 12022.5, subd. (a)). He was also convicted of two counts of assault with a firearm (§ 245, subd. (a)(2); counts II & III) stemming from the same incident, and the jury found true firearm enhancements (§ 12022.5, subd. (a)) in these two counts. Appellant was sentenced to an aggregate prison term of seven years.

On appeal, appellant raises various issues, including instructional error and prosecutorial misconduct. We reject his claims. We agree with the parties, however, that remand is required for the trial court to exercise its new sentencing discretion regarding the firearm enhancements. (§ 12022.5, subd. (c).) Our independent review of the record has also revealed clerical errors appearing in the abstract of judgment. We remand this matter so the trial court may exercise its sentencing discretion (§ 12022.5, subd. (c)) and to amend the abstract of judgment as appropriate. We otherwise affirm.

BACKGROUND

It is undisputed that appellant shot Pacheco using a 12-gauge shotgun. At trial, appellant asserted that he fired the fatal shot in self-defense. He claimed he aimed high and never intended to strike Pacheco.

The fatal encounter occurred on July 23, 2013, in a field near appellant's rural residence. Pacheco was shot in his back, and a pellet struck the back of his head. He bled to death from the shotgun wound to his back. According to a neighbor, this incident happened a little after 7:30 a.m. Around that time, the neighbor heard a "revving engine noise" and two gunshots. She heard the two men shouting at each other.

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1 All future statutory references are to the Penal Code unless otherwise noted.

2 Appellant had been charged with murder for Pacheco's death.

According to appellant and some of his family members, Pacheco was a suspected thief. Pacheco would access this rural land on a motorcycle and quickly get away. Appellant and other family members had agreed they would apprehend Pacheco if they could catch him. Appellant told the jury that the fatal encounter occurred after he spotted Pacheco on his property and it appeared that Pacheco was stealing. Appellant retrieved his shotgun and attempted to detain him.

It is undisputed that appellant fired his shotgun twice during the fatal encounter. The first shot was fired at the ground after Pacheco ignored appellant's commands to get on the ground. At that point, Pacheco was on a motorcycle about 20 or 30 yards away. Appellant claimed he fired the second shot in Pacheco's direction only after Pacheco appeared to be driving at him. According to appellant, he aimed high and over Pacheco's head. He said he fired the second shot to empty the shotgun so he could use it as a club if necessary. He thought he aimed the second shot "safely above" Pacheco.

Appellant testified that he was in fear because Pacheco appeared to be under the influence of drugs, and he appeared to be driving at him.[3] Appellant told the jury he has a mobility problem from a degraded hip, which made him feel "trapped." Appellant was also worried that Pacheco was reaching for a weapon as he rode at him on the motorcycle. Appellant testified that, as he raised his shotgun to fire the second time, Pacheco appeared to be trying "to twist" the handlebars around. According to appellant, when he fired his second shot, he could not see Pacheco based on the positioning of the shotgun's barrel after he raised it.

During an interview with law enforcement, appellant said he fired the second shot when Pacheco was about 20 or 25 yards away. A senior criminalist opined at trial that Pacheco was shot from a distance greater than 20 yards.

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[3] At trial, it was confirmed that Pacheco had methamphetamine in his system when he was killed. However, it was unclear what impact, if any, the drugs had on him at the time of his death.

The trial evidence was in conflict regarding how much time passed between appellant's two shots. Appellant estimated that the entire incident lasted less than five seconds. The neighbor believed the two shots were very "close" in time and were "kind of simultaneous." In contrast, appellant's wife told the jury that she was in the shower when she heard the first shot. She quickly got out and dressed. She heard a second shot as she was dressing. Appellant's sister testified that she heard two shots, which were about 15 to 20 seconds apart.

DISCUSSION

I. Instructional Error Did Not Occur Regarding The Law Of Self-Defense.

Appellant argues that the trial court prejudicially erred in failing to instruct the jury regarding the law of self-defense relative to the lesser included charge of involuntary manslaughter. He seeks reversal of his conviction in count I.

A. Background.

With CALCRIM No. 505, the trial court instructed the jury regarding self-defense. After explaining when self-defense applies, the court stated that, if the People did not prove beyond a reasonable doubt that the killing was not justified, the jurors must find appellant not guilty of murder. With this instruction, the court failed to mention that self-defense could also apply to manslaughter. It is that omission that appellant focuses on in the present claim.

B. Standard of review.

Instructional errors are questions of law, which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569–570.) We must ascertain the relevant law and determine whether the given instruction correctly stated it. (*People v. Kelly* (1992) 1 Cal.4th 495, 525–526.)

C. Analysis.

The parties agree, as do we, that self-defense applies to involuntary manslaughter. (See, e.g., CALCRIM No. 505 [listing manslaughter as applicable charge for instruction

on self-defense].) The parties further agree, as do we, that the trial court only referred to murder, and did not mention manslaughter, when using CALCRIM No. 505 to discuss the concept of self-defense.

Appellant argues there is nothing in this record to indicate that the jury considered and rejected his self-defense claim regarding involuntary manslaughter. We disagree. Based on the totality of this record, the jury was instructed that self-defense applied to involuntary manslaughter.

"When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner. [Citation.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) The issue is whether it is reasonably likely the jurors misunderstood the instruction in the manner appellant now suggests. (*People v. Nem* (2003) 114 Cal.App.4th 160, 165.) We must consider several factors, including the language of the disputed instruction, the trial record, and the arguments of counsel. (*Ibid.*)

This record establishes no instructional error. With CALCRIM No. 500, the trial court defined "homicide" and explained a homicide can be lawful or unlawful. "If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed the crime. If there's no legally valid excuse or justification, the killing is unlawful. And depending on the circumstances, the person is guilty of either murder or manslaughter."

With CALCRIM No. 571, the court instructed the jury regarding the concept of voluntary manslaughter. The court stated, in relevant part, that if the jury concluded that appellant acted in complete self-defense, it must find appellant "not guilty of any crime."

With CALCRIM No. 580, the court explained the concept of involuntary manslaughter. The jury was told that, for this concept to apply, the killing must be "unlawful" but lacking either an intent to kill or a conscious disregard for human life.

With CALCRIM No. 983, the court instructed that brandishing a firearm was a predicate offense for involuntary manslaughter. The jury was told, in relevant part, that the People had to prove that appellant did not act in self-defense to be guilty of this predicate crime.

Finally, during closing arguments, the prosecutor mentioned that, if appellant acted in self-defense, then appellant was "innocent" and the jury "should just fill out the not guilty form."

The totality of the instructions, and the prosecutor's comment, overwhelmingly conveyed to the jury that appellant was not guilty of any charge, including involuntary manslaughter, if he acted in lawful self-defense. We presume the jurors were "intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) Nothing suggests that we should disregard this presumption.

Based on this record, it is not reasonably likely the jury applied the isolated omission appearing in CALCRIM No. 505 in an impermissible manner. (See *People v. Houston, supra,* 54 Cal.4th at p. 1229.) It is not reasonably likely the jurors misunderstood this instruction as appellant now suggests. (See *People v. Nem, supra,* 114 Cal.App.4th at p. 165.) Accordingly, instructional error did not occur, and this claim fails.

II. Appellant Has Forfeited His Claim Of Prosecutorial Misconduct And This Claim Fails On Its Merits.

Appellant claims that prosecutorial misconduct occurred during closing arguments. He contends that the prosecutor misstated the law regarding when self-defense may be used. He seeks reversal of his three convictions.

A. Background.

During both his initial argument to the jury and in rebuttal, the prosecutor discussed appellant's claim of self-defense. During his rebuttal argument, the prosecutor

stated that a person must believe he or she is in "mortal danger" for perfect self-defense to exist. The prosecutor argued that, based on appellant's interview with a detective, appellant did not believe he was in "mortal danger" during the incident with Pacheco. As such, the prosecutor contended that self-defense did not apply in this situation.

B. Standard of review.

A prosecutor's actions violate the federal Constitution if it involves a pattern of egregious conduct that infects the trial with such unfairness as to deny due process. (*People v. Penunuri* (2018) 5 Cal.5th 126, 149.) Even if not fundamentally unfair, a prosecutor's conduct violates state law if it involves the use of deceptive or reprehensible methods in attempting to persuade either the trial court or the jury. (*Ibid.*) When the claim involves comments made by the prosecutor to a jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

C. Analysis.

We agree with the parties that it is misconduct for a prosecutor to misstate the law. (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) We also agree with the parties that self-defense applies when, in addition to other elements, a person is in reasonable fear of either death *or* great bodily injury. (*People v. Elmore* (2014) 59 Cal.4th 121, 133–134; see CALCRIM No. 505.)

Appellant contends that the prosecutor gave an incorrect statement of the law. According to appellant, the prosecutor failed to inform the jury that appellant's reasonable fear of great bodily injury could also have triggered perfect self-defense. To establish misconduct, appellant relies on *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*). He asserts that this alleged misconduct was prejudicial, requiring reversal of his convictions.

We reject these arguments. As an initial matter, appellant has forfeited this claim from a failure to object below. In any event, this claim also fails on its merits. Appellant does not show a reasonable likelihood that the jury understood or applied the disputed comments in an improper or erroneous manner.

1. Appellant has forfeited this claim.

As a rule, a claim of prosecutorial misconduct is forfeited if the defense fails to object and request an admonition to cure any harm. (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*).) Our Supreme Court makes clear that a failure to object will be excused only if an objection would have been futile or if an admonition would not have cured the harm. (*Ibid.*)

Appellant concedes that he failed to object to the prosecutor's comments in the lower court. As such, he has forfeited this claim. (*Centeno, supra,* 60 Cal.4th at p. 674.) In any event, we also reject this claim on its merits.[4]

2. Appellant does not show that the jury understood or applied the disputed comments in an improper or erroneous manner.

To prevail on a claim of prosecutorial misconduct based on comments to the jury, a defendant must show there was a reasonable likelihood the jury understood or applied the disputed comments in an improper or erroneous manner. (*Centeno, supra,* 60 Cal.4th at p. 667.) In making this showing, the defendant should examine the prosecutor's entire argument and the jury instructions. (*Ibid.*)

There is no reasonable likelihood that the jury construed or applied the prosecutor's disputed comments in an improper manner. With CALCRIM No. 200, the jury was told that it must follow the law as explained by the court. "If you believe the

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[4] To overcome forfeiture, appellant raises a claim of ineffective assistance of counsel. As we discuss below, appellant's claim of prosecutorial misconduct has no merit. As such, he cannot establish ineffective assistance of counsel. An attorney is not deemed incompetent when he or she fails to lodge meritless objections. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.)

attorneys' comments on the law conflict with my instructions, you must follow my instructions." Using CALCRIM No. 505, the trial court instructed the jury that self-defense applied if appellant held a reasonable belief that he was in imminent danger of being killed *or* suffering great bodily injury. The written jury instructions were provided to the jury for its deliberations.

In addition to the court's instructions, the prosecutor also gave the jury a correct explanation of self-defense. Earlier during closing arguments, the prosecutor noted that self-defense applied if appellant believed he was in "danger of death or great bodily injury." When discussing the concept of imperfect self-defense, the prosecutor commented that appellant must have believed he was in "mortal peril or peril of getting seriously hurt." During his closing statements, the prosecutor also cautioned the jury not to rely on the attorneys for the law. Instead, the jury had access to the written instructions, and the prosecutor encouraged the jurors to review those if needed.

The prosecutor's disputed comments during rebuttal were brief and isolated. We will not infer that the jury drew the most damaging rather than the least damaging meaning from them. (*Centeno, supra,* 60 Cal.4th at p. 667.) Moreover, the record overwhelmingly establishes that both the trial court and the prosecutor informed the jury that self-defense could apply if appellant reasonably believed he was in imminent danger of being killed *or* suffering great bodily injury. Even if the prosecutor's disputed comments are construed as a misstatement of law, arguments from counsel are generally considered to carry less weight with a jury than instructions from the trial court. (*Id.* at p. 676.) We are to presume that a jury will treat a prosecutor's comments as words spoken by an advocate while the court's instructions are viewed as binding statements of law. (*Ibid.*)

Appellant's cited authority, *Najera, supra,* 138 Cal.App.4th 212, does not assist him. In *Najera,* the prosecutor committed misconduct through repeated incorrect statements about the law of murder and voluntary manslaughter. (*Id.* at pp. 215, 220–

223.) Although the prosecutor also made correct statements of the law during his closing arguments, the appellate court determined that the prosecutor's statements created confusion for the jury. (*Id.* at p. 224.)

Najera is distinguishable. Unlike in *Najera*, the prosecutor here did not make repeated incorrect statements of law. We reject appellant's claims that the disputed comments may have misled the jury or undercut appellant's defense. It cannot be stated that the prosecutor's fleeting comments during rebuttal may have created confusion for the jury. *Najera* does not dictate reversal.

Based on this record, a federal due process violation did not occur because the prosecutor did not infect the trial with any unfairness or engage in a pattern of egregious conduct. (See *People v. Penunuri, supra,* 5 Cal.5th at p. 149.) Likewise, state law was not violated because the prosecutor did not rely on deceptive or reprehensible methods to persuade the jury. (*Ibid.*) Appellant does not show a reasonable likelihood that the jury understood or applied the disputed comments in an improper or erroneous manner. (*Centeno*, *supra,* 60 Cal.4th at p. 667.) Accordingly, prosecutorial misconduct has not been established and this claim fails.

III. We Will Not Strike The Firearm Enhancement In Count I.

Section 12022.5, subdivision (a), states that "any person who personally uses a firearm in the commission of a felony" shall receive enhanced punishment "unless use of a firearm is an element of that offense." Appellant contends that the imposition of a firearm enhancement against him in count I was improper because his involuntary manslaughter conviction was based on his personal use of a firearm. He argues that, based on how his case was prosecuted, his use of a firearm was an element of the involuntary manslaughter conviction. As such, he asks this court to strike the firearm enhancement imposed in count I. We decline to do so. The Courts of Appeal have already rejected this argument and appellant's assertion violates the plain language of section 12022.5, subdivision (a).

A. The language of section 12022.5, subdivision (a), is clear and the appellate courts have already rejected this claim.

In *People v. Read* (1983) 142 Cal.App.3d 900 (*Read*), this court rejected a similar argument to the one appellant now raises. *Read* held that a section 12022.5 enhancement could be imposed on a conviction of involuntary manslaughter based on brandishing a firearm. "*Firearm* use is not an element of the felony of involuntary manslaughter; just as murder, this crime can be committed in a variety of ways without using a firearm. [Citations.]" (*Read, supra,* 142 Cal.App.3d at p. 906.)

Likewise, the First Appellate District, Division One, reached the same conclusion in *People v. Quesada* (1980) 113 Cal.App.3d 533 (*Quesada*). In that case, the jury was told it could find the defendant guilty of involuntary manslaughter on a theory of either exhibiting a firearm or from criminal negligence. (*Id.* at p. 540.) On appeal, the defendant claimed the firearm use enhancement had to be stricken because use of the firearm was an element of the brandishing alternative. (*Ibid.*) The appellate court rejected this claim. "The crime of manslaughter may be committed in many ways without a firearm; the fact that this particular crime was committed with use of a firearm does not make such use an 'essential element' of the offense." (*Ibid.*)

We agree with the reasoning and holdings in both *Read* and *Quesada*. The words appearing in section 12022.5, subdivision (a), are clear. This section states that if a person personally uses a firearm in the commission of a felony, the person shall receive an enhanced punishment "unless use of a firearm is an element of that offense." Nothing appears ambiguous or confusing in section 12022.5, subdivision (a). Under basic rules of statutory construction, we will give effect to the statute's plain meaning. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

Appellant personally used a firearm in committing involuntary manslaughter, which is a felony. (§§ 17, subd. (a); 193, subd. (b).) The felony of involuntary manslaughter may be committed without the use of a firearm. As such, the use of a

firearm is not an element of involuntary manslaughter. (*Read*, *supra*, 142 Cal.App.3d at p. 906.) Thus, the firearm enhancement was properly imposed against appellant in count I. (§ 12022.5, subd. (a).)

B. Appellant's cited authorities do not establish that we must strike the firearm enhancement in count I.

Appellant contends that *Read* and *Quesada* were wrongly decided. He relies on language from two Supreme Court cases, *People v. Cox* (2000) 23 Cal.4th 665 (*Cox*) and *People v. Wells* (1996) 12 Cal.4th 979 (*Wells*) to establish error. Appellant's cited authorities do not alter our conclusion.

Both *Wells* and *Cox* explain when an underlying misdemeanor may support an involuntary manslaughter conviction. *Wells* held that an involuntary vehicular manslaughter conviction (§ 192, subd. (c)(1)) must be based on the circumstances of the defendant's actions and not based, in the abstract, on whether the underlying misdemeanor may or may not be dangerous to human life and safety. (*Wells*, *supra*, 12 Cal.4th at p. 985.) *Cox* applied the holding in *Wells* to a conviction of involuntary manslaughter stemming from a misdemeanor battery (§ 192, subd. (b)). (*Cox, supra,* 23 Cal.4th at pp. 670–671.) *Cox* confirmed that a court does not analyze the "inherent or abstract nature" of the underlying misdemeanor supporting an involuntary manslaughter charge. (*Id.* at p. 670.) Instead, the underlying offense "must be dangerous under the circumstances of its commission." (*Cox*, *supra*, 23 Cal.4th at p. 670.) As such, when involuntary manslaughter is predicated on an unlawful act constituting a misdemeanor, it must be shown that the underlying misdemeanor was dangerous to human life or safety under the circumstances of its commission. (*Id.* at p. 675.)

Neither *Cox* nor *Wells* assist appellant. These opinions address when a misdemeanor may support a conviction for involuntary manslaughter. (*Cox*, *supra*, 23 Cal.4th at p. 670; *Wells*, *supra*, 12 Cal.4th at p. 988.) These opinions did not analyze section 12022.5, subdivision (a), and they do not alter the plain language appearing in

that statute. Cases are not authority for propositions not considered or decided. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134.)

Appellant's argument is without merit that his firearm use was an element for conviction of involuntary manslaughter. Under the plain language of section 12022.5, subdivision (a), and the holdings in *Read* and *Quesada*, the firearm enhancement in count I was properly imposed. As such, we will not strike this enhancement and this claim fails.[5]

IV. The Trial Court Did Not Err In Declining To Stay The Assault Sentence.

Appellant was convicted of involuntary manslaughter and two counts of assault with a firearm (one for each shot fired). The trial court sentenced him to prison for three years (the middle term) for the involuntary manslaughter (§ 192, subd. (b); count I), along with an additional four years for the personal use of a firearm (§ 12022.5, subd. (a)). In addition, a concurrent prison sentence of three years (the middle term) was imposed for assault with a firearm (§ 245, subd. (a)(2); count III), along with a concurrent and additional four years for the personal use of a firearm (§ 12022.5, subd. (a)). The sentence for the assault with a firearm in count II, along with a firearm enhancement, was stayed pursuant to section 654 because this was the fatal shot. The trial court stated its belief that appellant fired his two shots about 10 to 15 seconds apart.

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[5] Appellant quotes the concurring and dissenting opinion in *Read* for the proposition that it is " 'close and subtle' " whether the Legislature intended a firearm enhancement to apply in the present situation. (*Read, supra,* 142 Cal.App.3d at p. 907 (conc. & dis. opn. of Zenovich, Acting P.J.).) Appellant further contends he is entitled to the benefit of any doubt whether the firearm enhancement should be construed against him. We reject these arguments. First, the statutory language in section 12022.5 is clear and unambiguous. Second, as stated in *Read*'s majority opinion, the Legislature intended to impose more severe penalties for homicides committed with a firearm. (*Read, supra,* 142 Cal.App.3d at pp. 902–903.)

Appellant asserts that the trial court erred when it refused to stay the sentence in count III for the other assault with a firearm. He asks that we order the sentence on count III stayed.

A. Standard of review.

A substantial evidence standard of review is used to analyze the trial court's implied findings that a defendant held a separate intent and objective for each offense. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414.) It is generally a factual matter whether the facts and circumstances reveal a single intent and objective within the meaning of section 654. (*Ibid*.) We are to review the trial court's findings in the light most favorable to the court's ruling and we are to presume the existence of every fact reasonably deduced from the trial evidence. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

B. Analysis.

The parties disagree whether the trial court erred in not staying punishment for the assault with a firearm in count III (the non-fatal shot). Appellant contends the evidence only shows a single criminal intent during his encounter with Pacheco. In contrast, respondent argues that appellant's actions, which were divisible in time, may support multiple punishments. The parties focus on whether *People v. Trotter* (1992) 7 Cal.App.4th 363 (*Trotter*) supports the trial court's ruling. We agree with respondent that the trial court did not err.

Section 654 bars the imposition of multiple sentences for a single act or omission, even though the act or omission may violate more than one provision of the Penal Code. (*People v. Mesa* (2012) 54 Cal.4th 191, 195.) This is true even if the trial court imposes multiple concurrent sentences. (*People v. Jones* (2012) 54 Cal.4th 350, 353.) The appropriate procedure is to sentence a defendant for each count and stay execution of sentence for those convictions which fall under section 654. (*People v. Dowdell, supra,*

227 Cal.App.4th at pp. 1413–1414.) The goal is to ensure that punishment is commensurate with criminal liability. (*Ibid.*)

Section 654 applies when a defendant's course of conduct violated more than one statute but represented an indivisible transaction. (*People v. Dowdell, supra,* 227 Cal.App.4th at p. 1414.) The issue centers on the defendant's intent and objective. (*Ibid.*) If all the offenses were incident to one objective, the defendant may not be punished more than once. (*Ibid.*) However, if the defendant had multiple criminal objectives which were independent of and not merely incidental to each other, multiple punishment is appropriate even though the violations were part of an otherwise indivisible course of conduct. (*Ibid.*)

In *Trotter, supra,* 7 Cal.App.4th 363, the defendant led police on a high-speed automobile chase. He fired at a pursuing officer with a gun. About a minute later, he fired a second shot at the same officer, followed by a third shot mere seconds later. (*Id.* at pp. 365–366.) On appeal, he argued he should not have been sentenced consecutively in two of the three assaults, arguing they were part of a single course of conduct and were incidental to one objective. (*Id.* at p. 366.) The appellate court disagreed. The defendant's conduct became more egregious with each successive shot, which posed a separate and distinct risk to the officer and other freeway drivers. Each shot required a separate trigger pull. All three shots were volitional and calculated. All three shots were separated by periods of time in which reflection was possible. None of the shots were spontaneous or uncontrolled. (*Id.* at p. 368.) The *Trotter* court concluded that section 654 is applicable for a single act, but the defendant committed three separate acts when firing the gun. Each shot demonstrated a separate intent to do violence. As such, the trial court did not err in punishing the defendant separately for two of the three assaults. (*Ibid.*)

In this matter, we reject appellant's contention that his two fired shots showed "an indivisible course of conduct with a single intent and objective." Similar to *Trotter*,

appellant's successive shots posed a separate and distinct risk to Pacheco. Each shot required a separate trigger pull. Both shots were volitional and calculated. The two shots were separated by periods of time in which reflection was possible. Two separate criminal acts occurred, and both of appellant's shots showed a separate criminal intent.

Based on this record, substantial evidence supports the trial court's implied findings that appellant held a separate intent and objective for the assault with a firearm (for the non-fatal shot) and the involuntary manslaughter. (See *People v. Dowdell, supra,* 227 Cal.App.4th at p. 1414.) The facts and circumstances do not reveal a single intent and objective within the meaning of section 654. (*Ibid*.) As such, the trial court did not err in declining to stay punishment for the non-fatal assault with a firearm (§ 245, subd. (a)(2); count III). (See *Trotter, supra,* 7 Cal.App.4th at p. 368.) Accordingly, this claim fails.

V. We Will Remand This Matter So The Trial Court May Exercise Its New Sentencing Discretion Regarding The Firearm Enhancements.

At the time of appellant's 2017 sentencing in this matter, the trial court was required to impose an additional prison sentence for the firearm enhancements found true under section 12022.5. (Former § 12022.5, subd. (a).) On October 11, 2017, however, the Governor approved Senate Bill No. 620 (Stats. 2017, ch. 682), which amended, in part, section 12022.5. Under the amendment, a trial court now has discretion to strike or dismiss this firearm enhancement. (§ 12022.5, subd. (c).) The parties agree, as do we, that this amendment applies retroactively to appellant because his case is not yet final. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The parties also agree, as do we, that remand is appropriate so the trial court may exercise its new sentencing discretion. (See *id.* at p. 1091.) Accordingly, we remand this matter for that limited issue.[6]

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[6] We take no position regarding how the trial court should exercise its discretion.

VI. The Abstract Of Judgment Must Be Amended To Correct Clerical Errors.

Based on our independent review of the record, we have discovered clerical errors appearing in the abstract of judgment. At sentencing, the trial court orally imposed both (1) a $40 court operations fee (§ 1465.8, subd. (a)(1)) and (2) a $30 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)). These assessments were imposed for all three convictions. The abstract of judgment, however, did not impose these assessments for all three counts. Instead, it imposed these assessments only once.

In addition, at sentencing, the trial court imposed a four-year firearm enhancement (§ 12022.5) in count III. This enhancement, along with the three-year term imposed for the assault with a firearm, were to run concurrently with the seven-year sentence imposed for the involuntary manslaughter. Although the abstract of judgment lists the firearm enhancements imposed in counts I and II, it does not list the firearm enhancement imposed in count III.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) An appellate court may correct clerical errors appearing in an abstract. (*Ibid.*)

We will direct the trial court to amend the abstract of judgment to reflect the orally imposed sentence. The amended abstract shall reflect a court operations assessment of $120 pursuant to section 1465.8. It shall also reflect a conviction assessment of $90 pursuant to Government Code section 70373. Finally, upon remand, if the court does not strike the firearm enhancements, then, in addition to the enhancements already appearing in counts I and II, the amended abstract shall also reflect a four-year firearm enhancement imposed in count III pursuant to section 12022.5.

DISPOSITION

This matter is remanded to the trial court so it may consider whether to strike or dismiss the imposed firearm enhancements pursuant to section 12022.5, subdivision (c).

If the court strikes or dismisses the firearm enhancements, then the court shall resentence appellant accordingly. If the court declines to strike or dismiss these enhancements, appellant's previously imposed sentence shall remain in effect. In any event, the court shall prepare an amended abstract of judgment to reflect a court operations assessment of $120 pursuant to section 1465.8. The amended abstract shall also reflect a conviction assessment of $90 pursuant to Government Code section 70373. If the court does not strike the firearm enhancements, then, in addition to the enhancements already appearing in counts I and II, the amended abstract shall also reflect a four-year firearm enhancement imposed in count III pursuant to section 12022.5. The court shall send a certified copy of the amended abstract to the appropriate authorities. The judgment is otherwise affirmed.

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LEVY, Acting P.J.

WE CONCUR:

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FRANSON, J.

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MEEHAN, J.